EDITOR'S NOTE

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AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

SUPREME COURT OF THE UNITED STATES

IMMIGRATION & NATURALIZATION SERVICE, Petitioner	
vs	NO. 86-21
VIRGINIA HECTOR, Respondent	

(3)

MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

COMES NOW Respondent to move this Court for leave to appeal informa pauperis for the reasons set forth in the accompanying affidavit.

DATED: 8/20/86

DAVID IVERSON, ESQUIRE
Attorney for Respondent
P.O. Box 8329
St. Thomas, U.S.V.I. 00801
(809) 776-1616

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and exact copy of the foregoing MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS, AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS and CONSENT to be mailed postage prepaid to Charles Fried, Esq. at U.S. Department of Justice, Washington, D.C. 20530 this 22nd day of August, 1986.

Claire Fortune

15pp

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE
TO APPEAL IN FORMA PAUPERIS

SUPREME COURT OF THE UNITED STATES

IMMIGRATION & NATURALIZATION SERVICE,	)	
Petitioner	)	NO. 86-21
vs	)	
VIRGINIA HECTOR,	)	
Respondent	)	

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL
IN FORMA PAUPERIS

I, VIRGINIA HECTOR, being first duly sworn, depose and say that I am the respondent in the above-entitled case, that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following: respond to petitioner's Petition for Writ of Certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you employed?

   a) Yes, at "Artland" Main Street, St. Thomas, U.S. Virgin Islands

      Salary: $95.00 per week

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a) No

3. Do you own any cash or checking or savings account?

   a) I have savings of $350

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   a) No

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   a) Greg Hector age 10 - son

   b) Charmaine Hector age 13 - niece

   c) Kathleen Hector age 12 - niece

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Virginia Hector
VIRGINIA HECTOR

SUBSCRIBED and SWORN to before me this 21st day of August, 1986.

NOTARY PUBLIC

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

SUPREME COURT JUSTICE

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No. 86-21

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER
v.
VIRGINIA HECTOR, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ORLOW, FULLER, RUBIN & STEEL
Attorney

DAVID IVERSON
Attorney

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT

Virginia Hector is a native and citizen of Dominica, West Indies who entered the United States April 24, 1975 and has maintained continuous physical presence in the United States since that date. She resides with her youngest child, eight years old, who is a United States citizen, as well as two of her neices, ages nine and ten, who are also United States citizens. The nieces have lived with Hector for more than two years. Her neices live with her because their parents remain in Dominica.

Hector petitioned for review to the United States Court of Appeals from the Third Circuit from a decision of the Board of Immigration Appeals (BIA) which affirmed an Immigration Judge's decision finding her deportable and not eligible for relief from deportation pursuant to §244(a)(1) of the Immigration and Nationality Act, 8 USC §1254(a)(1). The Immigration Judge refused to consider hardship to Mrs. Hector's neices. The BIA found the Third Circuit's decision in Tovar v. INS, 612 F. 2d 794 (1980) to be distinguishable on the facts. The BIA held that Mrs. Hector's relationship to her neices was not so emotionally intense nor of sufficient duration to supplant the relationship of the children to their natural parents. Further, even considering the potential hardship to the neices, the BIA found insufficient hardship.

The Court of Appeals remanded for further consideration of the hardship to the neices because it found that the Board had not meaningfully considered hardship to the neices and that the Board's analysis of that issue was conclusory. The Court considered contrary law of other Circuits as well as this Court's decision in INS v. Jong Ha Wong, 450 US 139 (1981) and INS v. Phinpathya, 464 US 183 (1984). The Court found greater discretion had been left to the courts on the hardship issue than on the question of "continuous physical presence" considered in INS v. Phinpathya. The Court therefore reaffirmed its Tovar decision. For these reasons the Court granted the petition and remanded to the Board for further consideration.

After taking more than six months to decide whether to file a petition for certiorari the Justice Department has filed a Petition for Certiorari asserting that the case presents,"...an important and recuring question of immigration law..." Petition for Certiorari, pg.9. For the reasons which follow, it is respectfully submitted that no such issue is presented by this case.

REASONS FOR DENYING PETITION

The Government argues that the Court of Appeals construction of the statute presents substantial administrative burdens to the Immigration and Naturalization Service. Despite

having complete access to the records of agencies within the Department of Justice, the Immigration and Naturalization Service, as well as the Executive Office for Immigration Review (containing the BIA) the Solicitor General presents absolutely no statistics or other evidence to support this assertion. The only support for this assertion is citation to five judicial decisions concerning the issue. Petition for Certiorari, pg. 19 n. 19. The apparent inference to be taken is that there are many other such cases in existence. This invitation to infer should not be accepted by the Court.

The grant of a petition for certiorari is reserved for "special and important reasons" under Supreme Court Rule 17. This case does not present special and important reasons for this Court to utilize its valuable time in considering the issue. Rather, the case presents an arcane and probably unimportant issue in all but a very small and narrow class of cases.

Suspension of deportation is afforded to aliens who merit a favorable exercise of the Attorney's discretion and who meet the statutory prerequisites of seven years of continuous physical presence, good moral character, and who in the opinion of the Attorney General would suffer extreme hardship if deported. The extreme hardship requirement can be satisfied by demonstrating hardship to the applicant themselves and/or their United States citizen or permanent resident spouse, parent, or child. §244(a)(1) of the Immigration & Nationality Act, 8 USC §1254(a)(1).

The Government's brief entirely overlooks the provision

in §244(a)(1) of the Act, 8 USC §1254(a)(1), which permits extreme hardship to the applicant to be considered. The Government argues as if hardship must be established to a citizen or permanent resident child. Such is not the case. Compare 8 USC §1254(a)(1) with 8 USC §1182(e) wherein exceptional hardship must be shown to a citizen or permanent resident spouse or child. Thus, even if hardship to Mrs. Hector's neices ought not be considered separately, hardship to her neices, with whom she plainly has a close relationship, would also inflict hardship upon herself.

If the Court of Appeals erred, and we submit below that they did not, in requiring the BIA to consider hardship to her neices, the error is plainly harmless. The Board must carefully consider each factor which bears upon hardship to Mrs. Hector. Certainly, one of those factors would be separation from her neices with whom she had maintained a close relationship. To distinguish between that hardship and separate hardship to the neices is difficult at best. Accordingly, any error committed by the Court of Appeals is harmless. This Court can uphold a decision of a Court of Appeals on a basis other than that set forth by the Court of Appeals itself. Certainly, the Court may decline a petition for certiorari where the Court of Appeals decision is correct, albeit for another reason.

Further overlooked in the government's petition is the limited nature of the remedy imposed by the Court of Appeals and the narrow class of cases involved. First, the Court of Appeals merely remanded this matter to the Board of Immigration Appeals

for further consideration of hardship to the neices. The Government seems to assume that a full blown trial on the issue will thus be necessitated. Under the law of the Third Circuit, such is not the case. In Amezquita-Soto v. INS, 706 F. 2d 898 (3rd Cir. 1983) the Court made it plain that all the Board had to do was consider the hardship to the de facto child in more than a summary fashion. It is highly unlikely that the result of such an analysis on remand would be different in this matter. The Court of Appeals decision upheld the Board in all other respects and it would certainly appear that the reasoning of the BIA with respect to the lack of hardship would apply even with careful consideration of hardship to the neices.

Moreover, the Government would lead the Court to believe that a full blown trial will be required each and every time an alien alleges a de facto relationship. Both the Board and the Immigration Judge retain broad discretion to exclude testimony which is not material. Therefore, an Immigration Judge remains fee to require a strong prima facie showing that a familial type relationship, as set forth in Tovar, is present. The facts of Tovar and those of Antoine-Dorcelli v. INS, 703 F. 2d 19 (1st Cir. 1983) surely indicate that these will be rare circumstances indeed.

The Government argues that the legislative history of the 1952 Immigration and Nationality Act as well as its subsequent amendments requires a determination that the Court of Appeals has improperly expanded the scope of the suspension

remedy. Petition for Certiorari, pp. 11-15. The Respondent readily concedes that Congress has provided a detailed definitional scheme to apply generally to visa issuance. The government cites no specific legislative history pointing to the precise and narrow application of the definition of child in §101(b)(1) to the suspension statute. Rather, the government can only point to generalized statements about uniform application of definitions.

The government's argument has superficial appeal. However, it requires the court to make the specific application of the definitional section to §244 and find that relationships like those described by Congress would not be sufficient. It is one thing to say that in the normal visa issuance procedure, see §202 and §203 of the Immigration Act, entitlements will be limited to those precisely identified by Congress, and it is another to say that Congress intended that only those specified could be considered pursuant to a remedial statute.

In 1962 by Pub. L. 87-885 Congress significantly altered the suspension statute and greatly liberalized the remedy. The 1962 amended statute remains largely in effect today. In 1962, Congress substituted the term "extreme hardship" for the previously more restrictive "exceptional and extremely unusual hardship" for applicants in Mrs. Hector's . In doing so, Congress acted to ameliorate the severity of the suspension remedy as enacted in 1952. In doing so, Congress evinced its intention that suspension of deportation be available as a remedy against the uniform application of the

immigration laws. Suspension of deportation, is by its own terms, the exception to the uniform application of the immigration laws. It would be anomalous to adopt the Government's view that the definitional section in §101(b)(1) must be applied uniformally to a remedial provision designed to ameloriate the hardships of a uniform application of the immigration laws.

This Court has held that where Congress has spoken with precision in setting forth the eligibility requirement of "continuous physical presence of seven years" a court may not expand the remedy beyond the specific limitations set by Congress. INS v. Phinpathya, 464 US 183 (1984). Also, where Congress has expressly delegated the construction of a statutory term to the administering agency, as with the extreme hardship provision, the definition of the term, in the first instance, is for the agency and may not be overturned because a court would prefer another construction. INS v. Wang, 450 US 139 (1981). The Government argues that these two principles coalesce to mandate the grant of this petition and reversal of the Court of Appeals' judgement.

It is submitted that the government overlooks the general remedial nature of the suspension remedy. The above are exceptions to the rule of statutory construction that a remedial statute be liberally construed.

Following this precept, the Court of Appeals in Tovar v. INS, 612 F.2d 794, 797 (1980), found in the language of the

suspension provision a legislative intent to protect immediate family members of the aliens family from the hardship of deportation. Because the relationship in Tovar was found to be so close to that of a parent and child, the Court found the Immigration Service had to consider hardship to the grandchild on remand.

Neither Wang nor Phinpathya requires a different result. Wang involved a Motion to Reopen deportation proceedings. The Court of Appeals' error in Wang was two fold. First, the Court relieved the alien of complying with the specific requirement of the regulations in order to reopen deportation proceedings. Secondly, the Court overturned the Agency's construction of the term "extreme hardship" and substituted definition. In Phinpathya, the Court of Appeals found an exception to the seven year physical presence requirement not readily found in the specific words of the statute.

In Tovar, the Court of Appeals neither ignored specific language, nor encroached upon the agency in an area specifically delegated to it. The Court merely found that the agency should consider hardship to individuals whom the alien has a relationship which is substantively the same as the relationships identified by Congress. In doing so, the court neither ignored the specific words of Congress, or encroached unduly on the authority of the agency. The court merely interpreted the intention of Congress with regard to whom should be considered in

making the hardship determination. Unlike the Wang court, the Tovar court did not tell not tell the agency what the result must be, nor did it redefine the term "hardship".

The government submits there is a split in the Circuits on this issue. On close examination, no such split is present. In addition to Tovar, the First Circuit in Antoine-Dorcelli v. INS, 703 F.2d 19 (1983), has found that relationships substantively like those set forth in the Act have to be considered by the agency. See also Chiara monte v. INS, 626 F.2d 1093, 1100 (2nd Cir. 1980).

Two courts of appeals have reluctantly taken a different position since the decisions in Jon Ha Wang and Phinpathya. In Contreras-Buenfil v. INS 712 F.2d 401 (9th Cir. 1983) and in Zamora-Garcia v. United States Dept. of Justice INS, 737 F.2d 488 (5th Cir. 1984) both courts believed themselves to be bound by Supreme Court precedent to hold that Tovar was no longer "good law". It is respectfully submitted that these Courts have given Wang and Phinpathya an overly broad reading and taken them out of their specific context. The government points to not a single court of appeals decision which has taken the contrary position to that of Tovar without stating that it was bound to do so by its reading of Supreme Court precedent.

CONCLUSION

The petition for Writ of Certiorari should be denied. The issue posed is not sufficiently important to be considered by the Court. The Court of Appeals error, if there was any, was

harmless. Lastly, the decision of the Court of Appeals was correct.

Respectfully submitted,

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